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No. 261

IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

SOUTHERN FARMS, INC.,
Petitioner

vs.

ARTHUR J. GOLDBERG, SECRETARY OF LABOR,
UNITED STATES DEPARTMENT OF LABOR,
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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WILSON - EPES PRINTING CO. - RE 7-6002 - WASHINGTON 1, D. C.

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Your petitioner, Southern Farms, Inc., petitions that a writ of certiorari be issued to review the final judgment rendered by the United States Court of Appeals for the Fifth Circuit in cause numbered 19,193 on the Docket of said Court, styled "Arthur J. Goldberg, Secretary of Labor, United States Department of Labor, Appellant, vs: Southern Farms, Inc., Appellee", and also the order entered by said Court denying petition for rehearing filed in said cause by this petitioner.

CITATIONS TO OPINIONS DELIVERED IN THE COURTS BELOW

1. The opinion of the United States District Judge for the Greenville Division of the Northern District of

Mississippi is not officially reported. A copy of this opinion appears in the appendix hereto as Exhibit A and also at page 74 of the record prepared for the United States Court of Appeals, nine printed copies of which are filed with this petition.

2. The opinion of the United States Court of Appeals for the Fifth Circuit is reported in 301 F. 2d 130. Copy of this opinion appears in the appendix hereto as Exhibit B.

JURISDICTION

The judgment of the United States Court of Appeals for the Fifth Circuit sought to be reviewed was dated and entered March 30, 1962. It appears in the appendix hereto as Exhibit C.

The order of the United States Court of Appeals for the Fifth Circuit denying this petitioner's petition for rehearing was dated and entered April 27, 1962. A copy of this order appears in the appendix hereto as Exhibit D.

The jurisdiction of this Court to review said judgment and order is conferred by 28 U. S. C. sections 1254 and 2101(c).

QUESTIONS PRESENTED FOR REVIEW

1. The sole relief sought by the respondent in the District Court was an injunction against petitioner. The District Court denied the injunction on each of two separate grounds. Each ground was sufficient in itself to support the judgment denying the injunction. The Court of Appeals held that the District Court was in error as to one of these grounds but was not in error as to the other ground. Nevertheless the Court of Appeals did not affirm the judgment of the District Court but on the contrary reversed and remanded it. The question is whether or not the Court of Appeals, having found the judgment

to be supported by one ground assigned by the District Court, was obligated by decisions of this Court and by the accepted and usual course of judicial proceedings to affirm the judgment of the District Court.

2. Whether the Court of Appeals erred in reversing the findings of the District Court that Greenwood Egg Company was a farm assembler and that it was also an establishment through which eggs customarily moved and that petitioner was exempted from compliance with the Fair Labor Standards Act of 1938 as amended (Act of June 25, 1938, c. 676, 52 Stat. 1060, 29 U. S. C. 201 et seq.) by 29 USC section 213 (a) (10), and the Secretary of Labor's regulation thereunder appearing as Section 536.2 in 29 Fed. Code Reg.

3. Whether the Court of Appeals erred in finding that one of petitioner's egg suppliers, Greenwood Egg Company, was not a farm assembler or an establishment through which eggs customarily moved within the meaning of the above mentioned regulation because its truck collected eggs more than 50 miles from petitioner's office, because Greenwood Egg Company's office and employees were in the same building as petitioner, because it used petitioner's assembly facilities in that building, and because it does not maintain a plant where it assembles eggs but brings the eggs in its trucks directly to petitioner, and then, on the basis of this conclusion, holding that petitioner was not exempt from compliance with the Fair Labor Standards Act.

STATUTES AND REGULATIONS WHICH THE CASE INVOLVES

The pertinent provision of the Fair Labor Standards Act, Act of June 25, 1938, c. 676, 52 Stat. 1060, as amended, is Section 13 of the Act (29 USC Sec. 213 (a) (10)) as follows:

"13 (a) The provisions of Section 6 and 7 shall not apply with respect to. . . . (10) any individual employed within the area of production (as defined by the Administrator), engaged in handling, packing, storing, ginning, compressing, pasteurizing, drying, preparing in their raw or natural state, or canning of agricultural or horticultural commodities for market, or in making cheese or butter or other dairy products; . . ."

The Secretary of Labor's regulation under the above statute defining the term "area of production" as used in said statute appears as Section 536.2 in 29 Federal Code Regulations. The pertinent portion of the regulation is the following:

"§ 536.2 'Area of production' as used in section 13 (a) (10) of the Fair Labor Standards Act

(a) An individual shall be regarded as employed in the 'area of production' within the meaning of section 13 (a) (10) in handling, packing, storing, ginning, compressing, pasteurizing, drying, preparing in their raw or natural state, or canning of agricultural or horticultural commodities for market, or in making cheese or butter or other dairy products:

(1) If the establishment where he is employed is located in the open country or in a rural community and 95 percent of the commodities on which such operations are performed by the establishment come from normal rural sources of supply located not more than the following air line distances from the establishment: . . .

(iv) With respect to the compressing and compress-warehousing of cotton, and operations on tobacco (other than Puerto Rican leaf tobacco), grain, soybeans, poultry or eggs—50 miles; or . . .

(b) For the purposes of this section:

(1) 'Open country or rural community' shall not include any city, town or urban place of 2,500 or greater population or any area within:

(i) One air line mile of any city, town, or urban place with a population of 2,500 up to but not including 50,000 or

(ii) Three air line miles of any city, town or urban place with a population of 50,000 up to but not including 500,000 or

(iii) Five airline miles of any city with a population of 500,000 or greater according to the latest available United States Census.

"(2) The commodities shall be considered to come from 'normal rural sources of supply' within the specified distances from the establishment if they are received (i) from farms within such specified distances, or (ii) from farm assemblers or other establishments through which the commodity customarily moves, which are within such specified distances and located in the open country or in a rural community, or (iii) from farm assemblers or other establishments not located in the open country or in a rural community provided it can be demonstrated that the commodities were produced on farms within such specified distances . . ."

STATEMENT OF THE CASE

The respondent instituted this suit against petitioner in the United States District Court for the Northern District of Mississippi under the authority of Section 17 of the Fair Labor Standards Act (29 U. S. C. 217). The sole relief sought therein was an injunction restraining petitioner and all persons acting on behalf of petitioner from violating the Fair Labor Standards Act of 1938 as amended.

Petitioner contended in the District Court and in the Court of Appeals that respondent was not entitled to the injunction for each of two separate reasons: (a) because petitioner was exempt from complying with the Fair Labor Standards Act by Section 13 (a) (10) of said Act (29 U. S. C. 213 (a) (10)) and the above mentioned regula-

tion issued by the Secretary of Labor pursuant thereto defining the term 'area of production' as used in the statute; and also (b), because although petitioner in good faith believed that it was exempt from the said Act, it nevertheless, when informed that the Secretary of Labor contended petitioner was not exempt, promptly and long before the filing of this suit brought itself into full compliance with the Fair Labor Standards Act, intended to continue to comply with it, and there was no probability that petitioner would violate the Act in the future. (R. 6-9)

The District Court heard the evidence on both defenses and decided both of them in favor of petitioner.

The District Court first found and decided that even if petitioner was not exempt from the Act, no injunction should issue because petitioner "in good faith believed" (as did the District Judge) that it was exempt from the Act but nevertheless, when the Secretary of Labor made the contention that petitioner was not exempt, the petitioner promptly and before this suit was filed brought itself into full compliance with the Act and "I find as a fact that it is probable that the defendant will continue in the future to comply fully with the provisions of the Fair Labor Standards Act."

The District Court then further found that no injunction should issue for the additional reason that the petitioner was exempt from the said Act.

The District Judge stated that he was finding on both issues "for the sole purpose of giving the Court of Appeals my entire views with respect to this, so that in the event of an appeal, and they disagree with my disposition, they would not have to send it back for further proceedings here, but could dispose of it there." (R. 74-6)

The judgment of the District Court, as distinguished from its opinion, also specifically found that petitioner

was exempt from the Fair Labor Standards Act and further that even if petitioner was not exempt from the Act, an injunction should not issue; and on the basis of each of these two findings, the judgment of the District Court denied respondent any relief and dismissed the complaint. (Ex. E in appendix hereto and P. 10 of record)

The respondent appealed to the United States Court of Appeals for the Fifth Circuit, which held that the District Court was in error in its finding that petitioner was exempt from the Fair Labor Standards Act but that the District Court was not in error in its other finding that an injunction should not issue even if the appellee was subject to the Act. Although the Court of Appeals held that the judgment of the District Court was sustained by its finding that no injunction should issue even though petitioner was not exempt from the Act, nevertheless the Court of Appeals, acting contrary both to the decisions of this Court and customary judicial practice, failed to affirm the judgment of the District Court, but on the contrary reversed and remanded the cause to the District Court for further proceedings.

There was no dispute about the facts bearing on whether or not petitioner was exempt from the Act and those facts are:

The agreed statement of facts dictated into the record on the trial was that petitioner was located in a rural community (Itta Bena, Mississippi), was engaged in purchasing, grading, and selling eggs, and had made regular shipments of eggs to other states; and that the facts with reference to petitioner's operations are such that it and its employees are exempt under the statute and the above mentioned regulation from complying with the Fair Labor Standards Act unless the facts with reference to petitioner's purchase of eggs from Kilmichael Feed Mill (hereinafter called Kilmichael), Denton Manufacturing Company (hereinafter called Denton), and Greenwood Egg

Company (hereinafter called Greenwood) made them subject to the Act.

Kilmichael, Denton and Greenwood are all located in rural communities within 50 airline miles of petitioner's establishment at Itta Bena, and all eggs sold by them to petitioner came from normal rural sources of supply within 50 miles of Itta Bena except that some of Denton's eggs were produced by a flock of chickens about 52 miles from Itta Bena, some of Kilmichael's eggs came from a flock located slightly more than 50 miles from Itta Bena, and some of Greenwood's eggs came from flocks located more than 50 miles away.

The sole issue on this point was correctly stated by respondent's brief in the Court of Appeals as follows:

> "The issue therefore is whether the eggs from out-of-area farms, in excess of the 5% tolerance, come to the defendant (petitioner) through 'farm assemblers or other establishments through which the commodity customarily moves', which are themselves located within the 50 mile limit."

In other words if Kilmichael, Denton and Greenwood are "farm assemblers or other establishments through which the commodity customarily moves" then petitioner is not subject to the Act.

Denton is the business name of J. M. Denton who has an ice plant at Shelby, Mississippi. He brings the eggs produced by his own chickens and the eggs that he buys from other producers to his ice plant, recases some of the eggs, sells some of the eggs to cafes and other people, and sends some of them by his truck to petitioner at Itta Bena.

Kilmichael is the business name of C. S. Brown who has a place of business at Kilmichael, Mississippi. He brings the eggs produced by his own chickens and the eggs that he buys from other producers to his establish-

ment where he assembles and loads them on his trucks and delivers them to petitioner and other purchasers.

The Court of Appeals decided that petitioner was not exempt from the Act solely on the basis that Greenwood was not a "farm assembler or other establishment through which the commodity customarily moves."

Greenwood is a partnership composed of James C. Morgan and Henry Orsborn. Each of them is one of the seven or more stockholders of petitioner. Greenwood maintains its office at Itta Bena, Mississippi, in the same building in which petitioner is located. It has and pays full time employees in this office, and from it conducts its business and pays the producers of the eggs that it buys. It also has other employees, including truck drivers. It produces eggs and also buys eggs in large quantities. It sells eggs in large quantities to others than petitioner. The eggs that Greenwood produces and those that it buys are collected from farms by its trucks which deliver some of them to purchasers other than petitioner and sells and delivers some of them directly to petitioner at Itta Bena. The only assembly facilities that Greenwood has are its employees, trucks and assembly facilities in conjunction with petitioner's facilities at Itta Bena.

It is undisputed that the above is the customary method in Mississippi of handling the egg business.

ARGUMENT

1. In not affirming this case the United States Court of Appeals for the Fifth Circuit so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

Inasmuch as the Court of Appeals found that the District Court's judgment refusing to issue an injunction was supported by one of the grounds therefor assigned by the

District Court, is was obligated both by the decisions of this Court and by the accepted and usual course of judicial proceedings to affirm that judgment.

The only possible reason for reversing and remanding the case to the District Court would be so that the District Court could decide whether or not to issue the injunction even though petitioner was not exempt from the Act; but that question has already been specifically tried and decided by the District Court and not reversed by the Court of Appeals. There is therefore no judicial reason for remanding the case to the District Court. There is nothing further for it to adjudicate.

As stated by this Court in United States vs. Silliman, 6 Wheat. 598, 5 L. Ed. 340:

> "The question before an appellate court is, was the judgment correct, not the ground on which the judgment professes to proceed."

In Helvering vs. Gowran, 302 U. S. 238, 82 L. Ed 224, 58 Sup. Ct. 154, this Court stated and held:

> "In the review of judicial proceedings the rule is settled that if the decision below is correct, it must be affirmed, although the lower court relied upon a wrong ground or gave a wrong reason. Frey & Son v. Cudahy Packing Co., 256 U. S. 208, 65 L. Ed. 892, 41 S. Ct. 451; United States v. American R. Exp. Co., 265 U. S. 425, 68 L. Ed. 1087, 44 S. Ct. 560; United States v. Holt State Bank, 270 U. S. 49, 56, 70 L. Ed. 465, 469, 46 S. Ct. 197; Langnes v. Green, 282 U. S. 531, 75 L. Ed. 520, 51 S. Ct. 243; Stelos Co. v. Hosiery Motor-Mend Corp., 295 U. S. 237, 239, 79 L. Ed. 1414, 1416, 55 S. Ct. 746; cf. United States v. Williams 278 U. S. 255, 73 L. Ed. 314, 49 S. Ct. 97."

In Riley Investment Company vs. Commissioner, 311 U. S. 55, 85 L. Ed. 36, 61 Sup. Ct. 95, this Court again stated and held:

> "Where the decision below is correct it must be affirmed by the Appellate Court though the lower tribunal gave a wrong reason for its action."

In Brown vs. Allen, 344 U. S. 443, 97 L. Ed. 469, 73 Sup. Ct. 397, this Court again quoted the above language with approval.

In Securities & Exchange Comm. v. Chenery Corporation, 318 U. S. 80, 63 S. Ct. 654, 87 L. Ed. 626, this Court stated the reason for the rule thus:

> "The reason for this rule is obvious. It would be wasteful to send a case back to a lower court to reinstate a decision which it had already made but which the appellate court concluded should properly be based on another ground within the power of the appellate court to formulate."

2. Petitioner is exempt from the Fair Labor Standards Act.

It is patent, and apparently not disputed, that both Denton and Kilmichael are either farm assemblers or establishments through which the commodity customarily moves, or both. If Greenwood falls within either of these categories, then petitioner is exempt from the Act.

Inasmuch as Greenwood's sole business is assembling eggs from farms by collecting them in its trucks and disposing of them, it would appear that Greenwood is a farm assembler. The regulation does not require that a farm assembler have any particular assembly facilities, and it does not prohibit eggs from being assembled, i.e. brought together, by means of a truck. Indeed, it is difficult to imagine any other practical method by which eggs can be assembled from farms, and the evidence shows that this is the method customarily followed in Mississippi.

Inasmuch as Greenwood's established place of business (an office and full-time employees) is within the 50 mile limit, it is not disqualified because it sends its trucks beyond the 50 mile limit to collect eggs. The regulation (Section 536.2) plainly states that the commodities shall

be considered to come from normal rural sources of supply within the specified distance from the establishment if they are received either from farms within such specified distances or from farm assemblers or other establishments through which the commodity customarily moves, which are themselves within such specified distances. The regulation clearly provides that if the assembler or other establishment is itself located within the specified distance it can collect eggs from beyond that distance.

We submit the undisputed evidence shows that Greenwood is an establishment through which the commodity customarily moves. It is a business establishment dealing in eggs for it has a fixed place of business at Itta Bena with employees and property used in the egg business, and it customarily collects, buys and sells eggs.

The regulation does not anywhere, by inference or otherwise, disqualify Greenwood from being an establishment through which the commodity customarily moves because its partners are among the stockholders of petitioner or because it has its office in the same building as does petitioner or because it uses assembly facilities in conjunction with petitioner, or because its trucks deliver eggs to petitioner without first physically depositing them in its own office; and we can think of no good reason why Greenwood should not be permitted to operate as economically as possible by having its office in the same building as petitioner, by sharing with petitioner some of the facilities in that building, and by not performing the useless labor of taking the eggs into its own office before taking them into petitioner's office. In any event the regulation as written does not attempt to prohibit or require these things, and we submit that, if the regulation is to be amended so as to incorporate these features and take away the exemption granted by Congress, it should be amended by the Secretary of Labor and not by the Court of Appeals. We submit further that until the regu-

lation is so amended this petitioner and those in similar circumstances have a right in conducting their business to rely on the statute and regulations as written.

Respectfully submitted,

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